IN THE DISTRICT COURT
AT PAPAKURA

I TE KŌTI-Ā-ROHE
KI PAPAKURA

CIV 2023-044-519
[2023] NZDC 17535

BETWEEN	GRANT JAMES PEACOCK, JAMES MAURICE PEACOCK and MAUREEN ANN PEACOCK as trustees of the Citadel Trust Plaintiffs
AND	WE ARE PASTE LIMITED First Defendant
AND	MORGAN MITCHELL SUTCLIFFE Second Defendant
AND	VAUGHAN ROBERT SMALL Third Defendant

Hearing: 9 August 2023

Appearances: D Reeves for Plaintiffs (by AVL)
N Tabb for Third Defendant (by AVL)

Judgment: 25 August 2023

RESERVED DECISION OF JUDGE K D KELLY

Introduction

[1] This decision relates to an objection to jurisdiction by the third defendant.

Background

[2] The plaintiffs are the trustees of the Citadel Trust, the registered proprietors of a commercial property in View Rd, Wairau Valley, Auckland. The first defendant agreed to lease the premises from the plaintiffs. The second and third defendants, as

shareholders and directors of the first defendant, jointly and severally guaranteed the lease arrangements between the plaintiffs and the first defendant.[1]

[3] On 13 April 2023 the plaintiffs applied for summary judgment against the defendants for arrears of rent and outgoings, as well as costs incurred by the plaintiffs in cancelling the lease and remediation of the premises.

[4] On 20 July 2022, however, the third defendant objected to the jurisdiction of the court to hear and determine the proceeding against him.

[5] On 25 July 2023 Judge Sharp entered summary judgment against the first and second defendants but directed that the summary judgment application against the third defendant is not to be dealt with until a decision on the objection to jurisdiction is determined.

Preliminary issue

[6] Rule 5.51(1) of the District Court Rules 2014 provides that a defendant who objects to the jurisdiction of the court to hear and determine the proceeding may, within the time allowed for filing a statement of defence and instead of so doing, file and serve an appearance stating the defendant's objection and the grounds for it.

[7] In this case, Judge Sharp directed that the plaintiff to file a notice of opposition and affidavit in support of the objection to jurisdiction. I agree with the third defendant that the course envisaged by the District Court Rules 2014 would have been for the plaintiffs to have filed an interlocutory application to set aside the appearance.[2] Given that the plaintiffs were complying with the directions of the court, however, the plaintiffs' notice of opposition was treated as an interlocutory application to set aside the appearance although there was no opportunity for the third defendant to then reply to that application. Neither party was prejudiced given that both had filed affidavits

[1] The parties signed an agreement to lease on 10 August 2021. Clause 4.1 of that agreement states that the first defendant shall enter into a formal deed of lease with the plaintiffs using the ADLS Deed of Lease form. The deed of lease is not signed but that parties agree that its terms apply – affidavit of Grant Peacock dated 28 July 2023 at [5] and affidavit of Vaughan Small dated 8 August 2023 at [2]

[2] DCR 5.51(5)

which touch on all relevant matters in relation to the objection. DCR 1.8 applies and the failure to comply with DCR 5.51(5) is an irregularity that does not nullify the proceeding or steps taken. The parties are thanked for their pragmatic approach to this matter.

Objection to jurisdiction

[8] The third defendant objects to the jurisdiction of the court to hear and determine the proceeding against him on the basis that the deed of lease between the plaintiffs and the defendants provides that any disputes are to be resolved by arbitration in accordance with the Arbitration Act 1996.

[9] Ms Tabb for the third defendant submits that there are two disputes that ought to be referred to arbitration.

[10] First, the third defendant says that he is not able to determine whether the amounts claimed by the plaintiffs are properly owing because the plaintiffs have not provided adequate disclosure of how that amount is made up.

[11] Secondly, as a result of the COVID-19 lockdowns the third defendant say that the defendants are entitled to an abatement of rent and outgoings, and disputes whether the plaintiffs have provided the correct level of abatement.

[12] That abatement applies to the COVID-19 lockdown periods is not disputed [3]

The deed of lease

[13] The relevant provisions of the deed of lease are as follows. Clause 1.1 of the deed of lease reads:

> **Rent**
>
> 1.1 The Tenant shall pay the annual rent by equal monthly payments in advance (or as varied pursuant to any rent review) on the rent payment dates. The first monthly payment (together with rent calculated on a daily basis for any period from the commencement date of the term to

[3] See *Coffee Culture Franchises Ltd v Home Straight Park Trustees Ltd* [2021] NZHC 577 [18 March 2021]; *SHK Trustee Company Ltd v NZDMG* [2022] NZHC 2620 [11 October 2022]

the first rent payment date) shall be payable on the first rent payment date. All rent shall be paid without any deductions or set-off by direct payment to the Landlord or as the Landlord may direct. (emphasis added)

[14] Clauses 3.1 and 3.6 of the deed of lease then provide:

Outgoings

3.1 The Tenant shall pay the outgoings properly and reasonably incurred in respect of the property which are specified in the First Schedule ...

3.6 After the 31st of March in each year of the term or other date in each year as the Landlord may specify, and after the end of the term, the Landlord shall supply to the Tenant reasonable details of the actual outgoings for the year or period then ended. Any over payment shall be credited or refunded to the Tenant and any deficiency shall be payable to the Landlord on demand. (emphasis added)

[15] Clause 27.5 of the deed of lease reads:

No access in Emergency

If there is an emergency and the Tenant is unable to gain access to the premises to fully conduct the Tenant's business from the premises because of reasons of safety of the public or property or the need to prevent, reduce or overcome any hazard, harm or loss that may be associated with the emergency including:

a) a prohibited or restricted access cordon applying to the premises; or

b) prohibition on the use of the premises pending completion of structural engineering or other reports and appropriate certifications required by any competent authority that the premises are fit to use; or

c) restriction on occupation of the premises by any competent authority,

then a fair proportion of the rent and outgoings shall cease to be payable for the period commencing on the date when the tenant became unable to gain access to the premises to fully conduct the tenant's business on the premises until the inability ceases. (emphasis added)

[16] Finally, clause 43 reads, in full:

Arbitration

43.1 The parties shall first endeavour to resolve any dispute or difference by agreement and if they agree by mediation.

43.2 Unless any dispute or difference is resolved by mediation or other agreement within 30 days of the dispute or difference arising, the same shall be submitted to the arbitration of one arbitrator who shall

conduct the arbitral proceedings in accordance with the Arbitration Act 1996 or any other statutory provision then relation to arbitration.

43.3 If the parties are unable to agree on the arbitrator, an arbitrator shall be appointed, upon the request of any party, by the president or vice president of the New Zealand Law Society. That appointment shall be binding on all parties to the arbitration and shall be subject to no appeal. The provisions of Article 11 of the First Schedule of the Arbitration Act 1996 are to be read subject to this and varied accordingly.

43.4 The procedures prescribed in this clause shall not prevent the Landlord from taking proceedings for the recovery of any rent or other monies payable under this lease which remain unpaid or from exercising the rights and remedies in the event of the default prescribed in subclause 28.1. (emphasis added)

Arbitration Act 1996

[17] Also relevant is article 8(1) of schedule 1 to the Arbitration Act 1996 which reads:

> A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting that party's first statement on the substance of the dispute, stay those proceedings and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative, or incapable of being performed, or that there is not in fact any dispute between the parties with regard to the matters agreed to be referred.

Submissions

[18] As noted, the first issue relates to outgoings.

[19] The third defendant disputes the outgoings claimed. While some information has been provided by the plaintiffs to him, it is submitted that the plaintiffs have provided an estimated monthly amount for outgoings rather than reasonable details of the actual outgoings as required by cl 3.6 of the deed of lease. It is also submitted that an estimate does not accord with the outgoings being properly and reasonably incurred per cl 3.1.

[20] The second issue relates to the abatement of rent and outgoings for COVID-19. The defendant submits that it has been established that cl 27.5 applies to the restrictions imposed in relation to COVID-19, and as access to the premises was

affected by the lockdowns, the tenant is entitled to abatement of rent and outgoings under this clause.

[21] It is submitted that either no abatement of rent and outgoings was provided for in the plaintiffs' claim for relief, or that a credit of $284.34 was made as an act of goodwill. If the latter, it is submitted this cannot be a fair proportion of rent and outgoings for the 3-month period from the start of the lease (30 August 2021) until 2 December 2021 (the last day of the second level lockdown period).[4]

[22] It is submitted that when there is an arbitration clause in an agreement, the court is required to stay the proceedings while the dispute is determined at arbitration.

[23] It is submitted that these disputes fall within the purview of cl 43.2, such that they must be referred to arbitration.

[24] Mr Reeves for the plaintiffs, on the other hand, submits that article 8(1) of schedule 1 to the Arbitration Act 1996 requires the third defendant to apply for a stay. The plaintiffs submit that no application for a stay has been filed.[5]

[25] Secondly, the plaintiffs submit that article 8(1) is inoperative by virtue of cl 43.4 of the deed of lease. That is, it is submitted that there is no restriction on the plaintiffs seeking to recover unpaid sums and that cl 1.1. of the lease provides that the annual rent is to be paid without any deductions or set-off.

[26] Thirdly, it is submitted that the issue of abatement was resolved between the parties and that the third defendant is not acting in good faith and only raises the issue of abatement now in an attempt to frustrate summary judgment proceedings. Moreover, it is submitted that none of the arrears sought to be recovered fell within the period for which abatement might be claimed.

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[4] The lockdown was from 21 September 2021 to 2 December 2021
[5] *Linco Properties Ltd v Townhouse Motel Ltd* [2020] NZHC 2404 [16 September 2020] at [15]

Issues

[27] The issues that are to be determined are:

(a) is there a dispute for the purposes of cl 43.2 of the deed of lease;

(b) does an application for a stay need to be filed; and

(c) does cl 43.4 of the lease render any dispute in relation to cl 43.2 inoperative for the purposes of the Arbitration Act 1996?

Issue 1: Is there a dispute?

[28] The third defendant has referred the court to a decision of Harrison J in *Asian Foods West City Ltd v West City Shopping Centre Ltd*,[6] where a challenge was raised as to whether a lease signed in 2001 could extend to a difference or dispute arising between the parties some years earlier.

[29] There Harrison J said that the arbitration clause in that deed was clear and that it embraced all differences and disputes which arise in respect of it, that is throughout its 10 years term. The clause was held to extend to all disputes or differences between the parties touching on or connected to the instrument or any steps taken arising out of, or which may affect the contractual relationship created by the lease.[7]

[30] I agree with Ms Tabb that while the clause in that case was drafted differently from the present clause, the differences are not material. In particular, I find that the reference to "all differences and disputes" in the arbitration clause in that case has the same meaning as the use of the words "any dispute or difference" in cl 43.2. As in *Asian Foods,* I agree that cl 43.2 embraces all differences and disputes which arise in respect of the deed of lease (that are not otherwise resolved within 30 days of the dispute arising).

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[6] *Asian Foods West City Ltd v West City Shopping Centre Ltd* HC AK CIV-2007-404-1215 [11 September 2007]

[7] Above n 6, at [28]

[31] I am also assisted by the third defendant's reference to *Linco Properties Ltd v Townhouse Motel Ltd* where Associate Judge Paulsen had cause to consider whether there was a dispute between the parties. While Associate Judge Paulsen was not satisfied that there was a dispute in that case, he said: [8]

> In *Methanex Motunui Ltd v Spellman* , Fisher J said in relation to the meaning of the word "dispute" for the purposes of the Arbitration Act:
>
> > The next word, and it is one that is particularly significant in the present case, is "dispute". At least in respect of existing disputes, useful dictionary definitions of "dispute" appear to include "argument or quarrel" (Collins English Dictionary , meaning 5) and "controversy, debate" (Concise Oxford Dictionary). Both appear to contemplate a situation in which two or more individuals have a relationship of conflict due to their expression and maintenance of conflicting views or positions. The provision for entry of an arbitral award as a judgment pursuant to art 35(1) of the First Schedule to the Act implies that the dispute between the parties must be one in respect of which an arbitration award would be of legal consequence. For there to be an existing dispute it also seems necessary that a nexus be formed between the different views or positions of the disputants by means of direct or indirect communication between them and that the difference of view or position be maintained in a way which continues to be of significance between them. That seems implicit in the dictionary definitions cited. It follows that for the purposes of the Act there will be a "dispute … between them" when two or more individuals express and maintain in relation to each other conflicting views or positions the resolution of which will or may be of legal consequence.

[32] Prima facie, it would appear that a relationship of conflict between the plaintiff and the third defendant as to the extent of monies payable under the guarantee, by way of both outgoings and the extent of abatement, are disputes that fall within article 8.1. They are also of legal consequence in that they go to how much money the third defendant is obliged to pay to the plaintiff even if that sum may be relatively small.

[33] The next consideration is whether the parties resolved those disputes.

[34] The issue of outgoings appears to be that the third defendant is not able to determine if the amounts claimed by the plaintiff are properly owing. This goes to both liability and quantum.

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[8] *Linco Properties Ltd v Townhouse Motel Ltd* [2020] NZHC 2404 at [28]

[35] In Mr Peacock's affidavit of 8 August 2023, filed the eve of the hearing, the plaintiffs have collated all outgoings related to the property being:

(a) body corporate invoices for fees for the years 10 October 2020 – 10 October in each of 2021, 2022, and 2023;

(b) National Fire Protection invoices dated 31 July 2021 and 12 August 2022; and

(c) combined rates assessments for the years ended 30 June 2022 and 2023.

[36] The plaintiffs have also provided a manuscript calculation which Mr Peacock has called 'Wash-Up'. According to these calculations the plaintiffs say that the defendants owe the plaintiffs $40.75 more than what is claimed (which the plaintiffs waive for the purpose of these proceedings).

[37] Upon reviewing these figures, however, it is not immediately clear to the court how these sums reconcile with the unpaid outgoings referred to in Mr Peacock's affidavit in support of summary judgment dated 13 April 2023, and paragraph 11 of Mr Peacock's affidavit of 28 July 2023. It may be that they do, but on its face, this is not clearly explained.

[38] Given that the third defendant has not yet responded to Mr Peacock's calculations of 8 August 2023, it is no longer clear whether there is still a dispute about outgoings. As at the date of this decision, however, not being advised to the contrary, I am satisfied that there remains a genuine dispute about what outgoings have been claimed.

[39] In relation to abatement, the evidence is of email exchanges between the third defendant and Mr Peacock for the plaintiffs.

[40] In an email dated 1 November 2021, the third defendant understands that rent is to be abated by 50%. In this letter the third defendant also asks for a payment schedule for OPEX.

[41] Mr Peacock responds the following day clarifying that while rent is abated at the rate of 50%, clause 27.6 does not apply to OPEX. Mr Peacock then sets out how he calculated the rent abatement from the move-in date of 30 August 2021 until 21 September 2021. Mr Peacock also refers the third defendant to a Perpetual Tax invoice which show the rent, OPEX and GST. Mr Peacock provided another copy of this invoice in the event the first one was misplaced or lost.

[42] Mr Peacock also explained that when the first defendants paid the first 3 months in advance (via Colliers), that did not include the OPEX of $601.67 which was due on the 30th of August, September and October. Mr Peacock explained that he would offset this against money which he owed the defendants. Mr Peacock then apologised if this was not the answer the third defendant was expecting.

[43] The following day, 3 November 2021, the third defendant emailed Mr Peacock back saying: "Thank you for the detailed explanation, very much appreciated and all seems fair."

[44] A little later the same day Mr Peacock replied confirming that the total OPEX for September, October, and November was $1,805.01 and the rent rebate was $1,521.67 which left $4,283.34 owing from the defendants to the plaintiffs. This appears to a clear reference to the set off discussion the day prior.

[45] I am not persuaded that this email correspondence constitutes an agreement as to abatement of both rent and outgoings. Clause 27.5 clearly applies to both rent and outgoings. I do not consider that the third defendant's response of 3 November 2023 can be relied on by the plaintiffs to show that there was an agreement reached about the abatement of outgoings because this response is premised on Mr Peacock's explanation that the clause does not apply to OPEX, which is not correct.

[46] Having regard to this email exchange I am satisfied that the parties were in agreement that a 50% rebate would apply to the rent but that there was no agreement in relation to OPEX.

[47] The next question is whether any abatement has been factored into the plaintiffs' calculations. In relation to this, upon reading Mr Peacock's affidavit of 28 July 2023, it is apparent, as Mr Peacock says,[9] that none of the arrears sought to be recovered fell within the period for which abatement might be claimed. I accept this. As is evident from the plaintiffs' bank statement, the missing payments are for May, June and July 2022 which is outside the COVID-19 lockdown period.[10] This, however, does not answer the question about whether an abatement has been applied to outgoings for the period of the COVID lockdowns and by reference to the correspondence, it would appear that it has not been.

[48] It would also appear that the "Statement Invoice for Overdue Rent"[11] includes a debit sum claimed of $7,253.34 when the plaintiffs' bank statement[12] shows this as a credit paid by the defendants on 11 July 2022. If I am correct, this tends to support my finding in relation to the first dispute.

Conclusion

[49] By way of summary, I am satisfied that there remains a genuine dispute about what outgoings have been claimed and about whether an abatement has been properly applied.

Issue 2: does an application for a stay need to be filed?

[50] As was set out in *Linco*, the correct approach to resolving an objection to summary judgment is that in *Zurich Australian Insurance Ltd v Cognition Education Ltd*.[13] Paulsen AJ said: [14]

> … The Supreme Court determined the issue whether art 8 of sch 1 requires the court to consider if there is an arguable defence to the plaintiff's claim sufficient to resist summary judgment before ordering a stay of proceedings. The court held:

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[9] Refer Peacock affidavit dated 28 July 2023 at [10] and exhibits 'C' and 'D'
[10] Auckland moving to Alert Level 3 on 21 September 2021 when businesses could open if they trade in a contactless way
[11] Exhibit 'D' to Peacock affidavit dated 28 July 2023
[12] Exhibit 'C' to Peacock affidavit dated 28 July 2023
[13] *Zurich Australian Insurance Ltd v Cognition Education Ltd* [2014] NZSC 188; [2015] 1 NZLR 383 at [34].
[14] Above n 13, at [24]

> Under art 8(1), a stay must be granted unless the court finds that the arbitration agreement is null and void, inoperative or incapable of being performed or it is immediately demonstrable either that the defendant is not acting bona fide in asserting that there is a dispute or that there is, in reality, no dispute. It follows from this that an application for summary judgment and an application for a stay to permit an arbitration to take place are not different sides of the same coin. In principle, the stay application should be determined first and only if that is rejected should the application for summary judgment be considered.

In making the evaluation whether there is a dispute referable to arbitration the court said:

> If it is clear that the defendant is not acting bona fide in asserting that there is a dispute, or it is immediately demonstrable that there is nothing disputable at issue, there is not in reality any "dispute" to refer to arbitration. In these circumstances, a stay could properly be refused and summary judgment would be available. By contrast, in other situations falling within the broad test (that is, the "no arguable defence" test applied on summary judgment), there will be what can properly be described as "disputes" even though they are ultimately capable of being determined by a summary process.

I therefore take a two-step approach. First, despite the absence of a formal application, I shall determine the defendants' request for stay of this proceeding. In this regard, I consider the defendants have the onus to establish there is an agreement to arbitrate and the existence of a dispute that is within it. If that onus is discharged it is for the plaintiff to show that the matter is one which should not be referred to arbitration. Only if I am satisfied that the proceeding should not be stayed, do I need to consider, at the second stage, whether the plaintiff is entitled to summary judgment.

[51] It is clear from this case, that despite the absence of a formal application for a stay, the court may still stay the proceeding. While article 8(1) does not sit comfortably alongside DCR 5.51, it must be that DCR 5.51 operates as if an application for a stay had been made. A plain reading of DCR 5.51 does not require an application for a stay to be made as well and, if that were required, it is hard to think what practical difference that would make.

[52] I am satisfied that what is required is that:

(a) an objection to jurisdiction is made;

(b) that there is an agreement to arbitrate; and

(c) the existence of a dispute that is within it.

[53] Once these are established, as they are here, it is for the plaintiffs to show that the matter is one which should not be referred to arbitration. This goes to the third issue below.

[54] If the plaintiffs can show that the matter is one which should not be referred to arbitration, then the appearance is to be set aside and the defendant be given time to file and serve a statement of defence. It is only then, that the court is to consider whether the defendant has any defence to the claim or whether there is no real question to be tried.

Issue 3: does cl 43.4 of the lease render any dispute in relation to cl 43.2 inoperative for the purposes of article 8(1) of schedule 1 to the Arbitration Act 1996?

[55] In the present case, I am persuaded that cl 43.4 means that cl 43.2 does not apply in this case.

[56] Bell AJ made clear in *Coffee Culture Franchises Ltd v Home Straight Park Trustees Ltd*, under cl 27.5 rent is re-set and that an abatement does not operate as a deduction. [15] The issue of abatement is therefore, an issue of rent.

[57] I am satisfied that cl 43.4 operates as an exception to cl 43.2 when the dispute is about the recovery of unpaid rent (whether abated or not) and outgoings. To read the clause as not applying to the disputed rent and outgoings here, would render cl 43.4 otiose.

[58] Put another way, for the purposes of article 8(1) of schedule 1 to the Arbitration Act 1996, the proceeding is not a proceeding to which the arbitration agreement applies, given cl 43.4.

[59] Seen in this light too, the issue of inoperability of the arbitration agreement does not arise.

[60] Accordingly, I am not persuaded that there is an issue as to jurisdiction.

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[15] *Coffee Culture Franchises Ltd v Home Straight Park Trustees Ltd* [2021] NZHC 577 at [24]

[61] If the third defendant is of the view that the sum claimed by way of rent is incorrect (including for reasons to do with abatement), then this is a matter for the defendant to set out in any statement of defence and may be the subject of an application for further and better particulars.

Result

[62] The objection to jurisdiction is set aside.

Directions

[63] The defendant to file and serve any statement of defence no later than 25 working days after the date of this judgment (i.e.by 29 September 2023).

K D Kelly
District Court Judge